Filed 4/23/19 Carla R. v. Superior Court CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CARLA R.,

Petitioner,

v.

THE SUPERIOR COURT OF FRESNO COUNTY,

Respondent;

FRESNO COUNTY DEPARTMENT OF SOCIAL SERVICES,

Real Party in Interest.

F078743

(Super. Ct. No. 17CEJ300389-3)

OPINION

THE COURT[*]

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. William Terrence, Judge.

Nichole M. Verville for Petitioner.

No appearance for Respondent.

Daniel C. Cederborg, County Counsel, and Kevin A. Stimmel, Deputy County Counsel, for Real Party in Interest.

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[*] Before Levy, Acting P.J., Detjen, J. and Peña, J.

Petitioner Carla R. (mother) seeks extraordinary writ review pursuant to California Rules of Court, rule 8.452 of the juvenile court's January 24, 2019, dispositional orders removing her four-month-old daughter, A.R., from her custody, denying her reunification services and setting a Welfare and Institutions Code[1] section 366.26 permanency planning hearing for May 9, 2019. On appeal, mother contends there was insufficient evidence to support the juvenile court's orders removing A.R. from her custody under section 361, subdivision (c)(1) and denying her reunification services under section 361.5, subdivision (b)(10) and (13). She seeks an order returning A.R. to her custody with or without voluntary maintenance services or alternatively an order for family reunification services. We deny the petition and her request for a stay of the section 366.26 hearing.

PROCEDURAL AND FACTUAL SUMMARY

On September 27, 2018, the Fresno County Department of Social Services (department) was notified that mother tested positive for amphetamines while delivering a baby girl the previous day. A.R. was born premature and placed in the neonatal intensive care unit. At the time, mother had five other children who ranged in age from nine months to seven years. They had all been removed from her custody because of her drug use and were living with their maternal grandmother, who was the legal guardian of the three oldest children. Mother and Juan, A.R.'s father, were homeless and living in a van with mother's 20- and nine-month-old sons, U.C. and J.C. They had been living with the grandmother until six months before when she asked them to leave because of their drug use. She told them she could not take any more children. The parents did not have any baby supplies and mother had not received any prenatal care.

Mother had been using methamphetamine for eight years and Juan for six. They had also received and failed to comply with voluntary family maintenance and family

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[1] Statutory references are to the Welfare and Institutions Code.

reunification services, which included drug treatment. They entered a rehabilitation program in November 2017 after they lost custody of U.C. and J.C. Mother was sober for several months afterward but relapsed.

The following day, the department conducted an Imminent Risk/Team Decision meeting, which the parents attended by telephone. Juan stated he was going to enter a drug treatment program the following day. Mother attempted drug treatment through two programs, Fresno First and La Nexa, but did not complete either one. She was sober for a short period after she left La Nexa but relapsed. Mother stated she and Juan wanted to get into drug treatment while she was pregnant with A.R. and even before, but they were having problems with her medical insurance and A.R. "came too fast." Mother stated they could not care for A.R. at that time. The social worker informed them their family reunification services were terminated two weeks before and their case was transferred to the adoption unit.

The department decided voluntary family maintenance services were not appropriate and, on October 5, 2018, served a protective warrant on A.R. at the hospital. By that time, the parents were in residential treatment, Juan having entered Nuestra Casa Recovery Home (Nuestra Casa) on September 29, 2018, and mother Fresno First on October 1.

The department filed a dependency petition on A.R.'s behalf, alleging the parents' methamphetamine use placed A.R. at a substantial risk of harm. (§ 300, subd. (b)(1) (failure to protect).) As supporting facts, the department stated A.R. was mother's fourth child exposed to drugs in utero and mother continued to use methamphetamine despite having received voluntary family maintenance services in 2015 and family reunification services in 2017. The petition also alleged mother abused or neglected A.R.'s brothers, U.C. and J.C. (the brothers), thus placing A.R. at a similar risk of harm. (§ 300, subd. (j) (abuse of sibling).) The brothers were removed from mother's custody in December 2017 at the ages of 11 months and one week, respectively, because of her drug use. The

juvenile court ordered reunification services for mother, but she failed to comply. The court terminated her services on September 4, 2018.

The juvenile court ordered A.R. detained pursuant to the petition and ordered the department to offer the parents random drug testing. The court set a combined hearing on jurisdiction and disposition for November 2018. After the hearing, mother met with a social worker who provided her information about scheduling random drug testing and visitation.

On October 26, 2018, the parents visited A.R. at the hospital. She was doing well and scheduled to be discharged that afternoon. They were affectionate with her, holding and kissing her throughout the visit. They changed her diaper and outfit and mother fed her. At the end of the visit they kissed her and told her they loved her and would see her soon. They were advised of their right to waive reunification services but declined. A.R. was discharged from the hospital into the custody of her maternal grandmother.

The department filed its report for the combined hearing in November 2018, recommending the juvenile court deny the parents reunification services under section 361.5, subdivision (b)(10) because they failed to make reasonable efforts to treat their drug addiction following the termination of their reunification services in September 2018 as to the brothers. It also recommended the court deny them services under subdivision (b)(13) because of their "extensive, abusive, and chronic use of drugs" and resistance to court-ordered treatment. Because of their ongoing drug use, the department also opined it would not be in A.R.'s best interest to offer them reunification services. Even though they appeared motivated, the department was skeptical of the reason. Mother stated she was going to participate this time to keep A.R. out of the foster care system as the maternal grandmother stated she was unable to care for her.[2] In addition,

[2] The maternal grandmother hid from the parents her intention of taking custody of A.R., believing they would not be motivated to enter drug treatment if they knew.

even though they were loving to A.R. during their one visit with her, the department questioned their ability to develop a healthy parent-child relationship with her given their history of neglect. The department asked the court to take judicial notice of the brothers' dependency case.

The juvenile court continued the combined hearing to January 24, 2019, and granted the parents' request for a contested hearing. Prior to the hearing, the parents obtained letters from their respective treatment programs. Mother's letter, dated January 10, 2019, stated that she entered Rescue the Children on December 6, 2018. Rescue the Children, a nonprofit Christian organization and ministry of the Fresno Rescue Mission, offered an 18-month program, which included six months of transition. Mother was doing well, attending all her classes and recovery meetings and participating in one-on-one therapy sessions. Her overall progress was deemed "acceptable" and her participation "minimal." Juan's letter dated December 27, 2018, stated he successfully completed 90 days of inpatient treatment at Nuestra Casa and maintained his sobriety throughout his treatment.

Mother's attorney filed a statement of contested issues, challenging the sufficiency of the evidence to support jurisdictional findings under section 300, subdivisions (b) and (j) and denying reunification services under section 361.5, subdivision (b)(10) and (13).

On January 17, 2019, at a settlement conference, the juvenile court confirmed the January 24 contested combined hearing.

At the combined hearing, the juvenile court took judicial notice of the brothers' dependency case and received the parents' letters in evidence. Supervising social worker Abigail Messa testified she was assigned to A.R.'s case from its inception. She was also familiar with the parents' voluntary family maintenance case in which they were ordered to participate in parenting, substance abuse and mental health services but failed to comply. Mother was discharged from two substance abuse treatment programs in 2016, the first one for fighting with a resident. She was discharged from Fresno First at the end

of 2018 for the same reason. On cross-examination, Messa clarified mother's conflict at Fresno First was with her roommate who she observed mistreat her own child. Mother defended the child, resulting in an altercation.

Messa was aware the parents were participating in residential drug treatment programs, but the programs were not approved by the department. Programs are approved if they meet the department's treatment guidelines and if the department has a contract with the program. Having a contract allowed the department to obtain assessments, recommendations and results. She was also aware that Juan completed residential treatment at Nuestra Casa on December 27, 2018, but did not know if he was maintaining his sobriety. As far as she knew, both parents had been sober since they entered their respective treatment programs. However, because they were not drug testing for the department, she did not have any test results. The fact that the parents were currently in programs and Juan completed a program did not change her recommendations because they had not shown the ability to maintain sobriety.

Neither Messa nor anyone from the department evaluated the programs the parents were participating in to determine if they met the department's treatment guidelines. Nor had anyone spoken to the parents to ascertain how they were progressing or whether they were utilizing the techniques they learned. Messa could not assess A.R.'s bond with mother because she had never observed them together but understood from the reports that mother was nurturing toward A.R.

Messa testified the social worker assigned to A.R.'s case resigned on January 9, 2019, and there was not a social worker assigned to the case. She, however, was the acting social worker on the case.

Mother testified she entered residential treatment at Fresno First right after A.R. was born and had been sober since she entered Fresno First on October 1, 2018. She was currently in Rescue the Children, attending a parenting class, a boundary class, Celebrate Recovery and the 12-step program. She was also participating in therapy. She believed

Rescue the Children was more effective for her than other programs because its method required her to reflect on herself more deeply. As a result, she was learning a lot about herself, how to be a better person and how to be a better parent. She attended all her visits with A.R. and was bonding with her. She fed her, napped with her and experienced the joy of seeing her daughter giggle for the first time. She understood the mistakes she made in the past, was committed to staying sober and believed the treatment she was receiving at Rescue the Children would help her stay sober. She acknowledged, however, that her longest prior period of sobriety was three months.

Following testimony, minor's counsel, joined by the parents' attorneys, requested a continuance under section 352 to allow the department to assess the parents' progress to determine whether it would be detrimental to return A.R. to their custody. Minor's counsel suggested a 30- to 60-day continuance during which the department could administer its own drug testing to assess the parents' sobriety and the effectiveness of their treatment. The parents' attorneys argued a continuance would not be detrimental to A.R. since she was placed with her maternal grandmother, which was the long-term plan for her.

Mother's attorney argued subdivision (b)(10) of section 361.5 did not apply because mother made reasonable efforts to treat her drug addiction by entering treatment on October 1, 2018. As to subdivision (b)(13), she could not dispute its applicability but argued reunification would, nevertheless, serve A.R.'s best interest in light of mother's "spectacular" current efforts.

The juvenile court denied the motion to continue, disagreeing that it did not have updated information regarding the parents' status. The court pointed to the parents' letters, which were received and considered. The court adjudged A.R. a dependent child as alleged in the petition, ordered her removed from parental custody, denied the parents reunification services as recommended and set a section 366.26 hearing.

DISCUSSION

I.

Removal

A juvenile court may remove a dependent child from parental custody on a finding by clear and convincing evidence "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's … physical custody." (§ 361, subd. (c)(1).)

"A removal order is proper if based on proof of parental inability to provide proper care for the child and proof of a potential detriment to the child if he or she remains with the parent. [Citation.] 'The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child.' [Citation.] The court may consider a parent's past conduct as well as present circumstances. [Citation.] [¶] Before the court issues a removal order, it must find the child's welfare requires removal because of a substantial danger, or risk of danger, to the child's physical health if he or she is returned home, and there are no reasonable alternatives to protect the child. [Citations.] There must be clear and convincing evidence that removal is the only way to protect the child." (*In re N.M.* (2011) 197 Cal.App.4th 159, 169–170.) However, the juvenile court has broad discretion in making a dispositional order. (*In re Cole C.* (2009) 174 Cal.App.4th 900, 918.)

We review a dispositional order for substantial evidence, bearing in mind the heightened burden of proof. (*In re Ashly F.* (2014) 225 Cal.App.4th 803, 809.) Here, substantial evidence supports the court's determination that removal was necessary.

Mother had an eight-year history of methamphetamine use with intermittent relapse and very short periods of sobriety. During that time, she had six children, four of whom she exposed to methamphetamine. The substantial danger she posed to A.R. if

returned to her custody was the same risk she posed to all her children; that is, the risk that she would relapse and neglect her. The fact that she had achieved four months of sobriety by the dispositional hearing does not abate that risk given her many years of drug use and relapse pattern.

Mother, nevertheless, contends the juvenile court lacked recent evidence on which to assess the risk of returning A.R. to her custody. It lacked such evidence, she asserts, because the department failed to provide it. The most recent evidence the department provided was its November 2018 dispositional report, which merely stated she was participating in residential drug treatment. The department made no subsequent effort to ascertain the nature of treatment she was receiving at Rescue the Children or what progress she was making. Mother acknowledges however, she provided the updated evidence the court needed. Her letter from Rescue the Children informed the court she entered its 18-month program on December 6, 2018. It listed the many classes available and identified the ones in which mother was enrolled and the frequency of her attendance. The program included therapy, 12-step meetings and random drug testing. As of the date of the letter, January 10, 2019, mother was "doing well, meeting all her requirements of attending classes, recovery meetings and her work duties." She had recently started her one-on-one weekly therapy sessions. Her overall progress was considered "acceptable" with the additional comment that "she shows a desire to change." The court also had the benefit of mother's testimony she was benefitting from treatment and bonding with A.R.

On the evidence before it, the juvenile court could properly find returning A.R. to mother's custody would place A.R. at a substantial risk of harm because of mother's long history of methamphetamine use and relapse. Further, mother does not challenge the second required finding under the removal statute; i.e., no reasonable means to protect the child short of removal. She does not assert, for example, that A.R. could have been placed with her at Rescue the Children and there is no evidence either way on the record.

In any event, mother bore the burden on appeal of showing error as to both statutory provisions. Because she does not present any argument or refer to any evidence in the record regarding the second prong, we consider it abandoned.

II.

Denial of Reunification Services

When the juvenile court removes a child from parental custody at the dispositional hearing, it is required to provide reunification services to the child and the parents. (§ 361.5, subd. (a).) The purpose of providing reunification services is to "eliminate the conditions leading to loss of custody and facilitate reunification of parent and child. This furthers the goal of preservation of family, whenever possible." (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 478.) However, subdivision (b) of section 361.5 exempts from reunification services, " ' "those parents who are unlikely to benefit" ' [citation] from such services or for whom reunification efforts are likely to be 'fruitless.' " (*Jennifer S. v. Superior Court* (2017) 15 Cal.App.5th 1113, 1120.) The 17 different paragraphs set forth in subdivision (b) of section 361.5—which authorize denial of reunification services under various specific circumstances—are sometimes referred to as " 'bypass' " provisions. (*Melissa R. v. Superior Court* (2012) 207 Cal.App.4th 816, 821.)

Once the juvenile court determines one of the bypass provisions applies, " ' "the general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources." ' " (*In re William B.* (2008) 163 Cal.App.4th 1220, 1227.) Thus, if the juvenile court finds a provision of section 361.5, subdivision (b), applies, the court "shall not order reunification for [the] parent ... unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child." (§ 361.5, subd. (c)(2).) "The burden is on the parent to ... show that reunification would serve the best interests of the child." (*In re William B.*, at p. 1227.)

"We review an order denying reunification services under [section 361.5] for substantial evidence. [Citation.] Under such circumstances, we do not make credibility determinations or reweigh the evidence. [Citation.] Rather, we 'review the entire record in the light most favorable to the trial court's findings to determine if there is substantial evidence in the record to support those findings.' [Citation.] In doing so, we are mindful of the higher standard of proof required in the court below when reunification bypass is ordered." (*Jennifer S.*, *supra*, 15 Cal.App.5th at pp. 1121–1122.) If there is substantial evidence to support the order, the appellate court must uphold the order even if evidence could support a contrary holding. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 251.) Further, when the juvenile court finds multiple statutory grounds for denying reunification services, we need only conclude substantial evidence supports one of them in order to affirm the juvenile court's denial of services order. (*In re Brian M.* (2000) 82 Cal.App.4th 1398, 1401.) In this case, we conclude the court properly denied services under section 361.5, subdivision (b)(13).[3]

The juvenile court may deny reunification services under section 361.5, subdivision (b)(13) on clear and convincing evidence the parent of the child has a "history of extensive, abusive, and chronic use of drugs or alcohol" and, as relevant here, "has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought the child to the court's attention, ..." (§ 361.5, subd. (b)(13).)

Mother concedes the provisions of section 361.5, subdivision (b)(13) apply to her insofar as she "has a history of extensive, abusive, and chronic use of drugs" and "resisted the prior court ordered treatment." She contends, however, the juvenile court

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[3] Our conclusion the juvenile court properly denied mother reunification services under subdivision (b)(13) of section 361.5 obviates the need to review the evidence supporting its denial of services under subdivision (b)(10).

erred in failing to expressly find reunification services would not serve A.R.'s best interest under section 361.5, subdivision (c)(2).

The juvenile court was not required to make an express finding as to A.R.'s best interest regarding reunification services. Once the juvenile court finds subdivision (b)(13) of section 361.5 applies, it is prohibited from ordering reunification services. A best interest finding is only required if the court orders reunification services despite the applicability of subdivision (b)(13): "[t]he court shall not order reunification for a parent ... described in paragraph … (13), … of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child." (§ 361.5, subd. (c)(2).)

We find no error.

DISPOSITION

The petition for extraordinary writ is denied. This court's opinion is final forthwith as to this court pursuant to rule 8.490(b)(2)(A) of the California Rules of Court.